BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES LEWIS	)	
Claimant	)	
VS.	)	
	)	Docket No. 267,040
BUILDING TECHNOLOGY ENGINEER	)	
Respondent	)	
AND	)	
	)	
AMERICAN CASUALTY COMPANY OF READING, PA.	)	
Insurance Carrier	)	

ORDER

Claimant has appealed the March 12, 2004 Award of Administrative Law Judge Brad E. Avery. Claimant was denied a permanent partial general disability beyond his functional impairment after the Administrative Law Judge (ALJ) determined that claimant had not put forth a good faith effort to find employment after his termination of employment with respondent and that the wage, which should be imputed under K.S.A. 44-510e, was a wage which was comparable to the wage claimant was earning at the time of his employment with respondent. The Appeals Board (Board) heard oral argument in this matter on August 31, 2004.

APPEARANCES

Claimant appeared by his attorney, George H. Pearson of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, John David Jurcyk of Roeland Park, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge.

ISSUES

Claimant's Application for Review lists only one issue, that being whether the wage imputed to claimant was appropriate in limiting the case to a functional impairment instead of a work disability. However, respondent, in its brief, also raised the issue of a preexisting functional impairment and whether claimant's ongoing back problems stemmed from his injury with respondent or whether they stemmed from the similar difficulties claimant experienced with his back from previous injuries suffered to the same area of the back.

The issues to be considered by the Board are, therefore:

(1) Whether claimant sustained personal injury by accident resulting in a permanent impairment as a result of the injuries occurring on February 26, 2001.

(2) What, if any, wage should be imputed to claimant pursuant to K.S.A. 44-510e? And, more specifically, what is claimant's wage-earning ability under K.S.A. 44-510e after the injury of February 26, 2001?

(3) Whether respondent is entitled to a credit under K.S.A. 44-501(c).

The parties stipulated at the time of oral argument to the Board that claimant did not put forth a good faith effort in his job search after leaving respondent. Therefore, the imputing of a wage is mandated by K.S.A. 44-510e.

At oral argument to the Board, claimant's attorney raised an objection to the inclusion of the report of respondent's vocational expert Dan Zumalt, arguing that Mr. Zumalt's opinion was in violation of the rule set forth by the Kansas Supreme Court in *Roberts.*[1]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant began working for respondent on February 1, 2000, as a night maintenance mechanic. His job responsibilities included spreading salt melt and sand on sidewalks and parking lots anytime there was ice or snow on the ground. On February 26, 2001, claimant loaded numerous bags of salt, weighing anywhere from 50 to 70 pound a piece, into a tractor and spread the salt over the sidewalks and parking lots of respondent's facility. Claimant was working the third shift, which was the midnight-to-8:00 a.m. shift, and was alone.

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[1] *Roberts v. J. C. Penney Co.*, 263 Kan. 270, 949 P.2d 613 (1997).

While claimant did not experience a specific onset of pain that night, he did testify that he hauled the bags of salt all night long and was very fatigued by the time he went home that morning. After work, claimant went home, took a shower and, after sleeping for a period of time, realized he could not get out of bed. He described his symptoms as being in the lower part of his back, radiating into his legs, with numbness bilaterally, and pain on the left side, down to his toes. On the right side, the pain stopped at his hip.

Claimant contacted respondent, reporting to his acting supervisor, Donald Douglas, advising that he had injured his back and was going to be off work for a period of time. Claimant was advised to go to St. Francis Hospital and was sent to Dr. Edwards for his initial treatment. Claimant later came under the treatment of orthopedic surgeon Donald D. Hobbs, M.D., and was also referred to orthopedic surgeon Michael L. Smith, M.D. In February of 2002, Dr. Smith performed a lumbar discectomy and hemilaminotomy on claimant at the L4-5 level to repair a herniated disc. Claimant was released with specific restrictions from Dr. Smith, limiting him to occasional lifting of up to 35 pounds, frequent lifting 15 pounds and constant lifting 7 pounds, with squatting, crawling and kneeling to tolerance.

On November 1, 2002, claimant was referred to Dale D. Dalenberg, M.D., a board certified orthopedic surgeon, with the referral coming at the request of claimant's attorney. Dr. Dalenberg diagnosed claimant's post-surgical procedures and rated claimant at 10 percent to the body as a whole on a functional basis under the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). He testified that this rating would be as a result of the February 26, 2001 injury. Dr. Dalenberg restricted claimant to no lifting in excess of 50 pounds. Dr. Dalenberg was provided a task list prepared by vocational expert Richard Santner. Of the thirty-one tasks listed, Dr. Dalenberg found claimant incapable of performing fourteen, for a 45 percent task loss.

On cross-examination, Dr. Dalenberg acknowledged that claimant had suffered several back injuries prior to his employment with respondent. Claimant was involved in a motor vehicle accident in 1984, suffering a back sprain. After undergoing conservative treatment, he was released and returned to his usual duties. While in prison in Illinois, claimant slipped and fell, suffering injury to his low back in 1995. A CT scan performed in May of 1996 displayed a herniated disc at the same level as claimant's 2002 surgery. Claimant again underwent conservative treatment, refusing the offered surgery at that time. The symptoms in 1996 were very similar to those experienced by claimant after the fall in 2001, with radiculopathy into his legs, testicular pain, bilateral leg numbness and low back pain. Claimant was placed on significant lifting restrictions, but testified that these restrictions were ultimately removed.

When claimant applied for employment with respondent, he underwent a preemployment physical, passing the test, and was put to work with respondent without

restrictions. Claimant testified that between 1995 and 2001, he improved considerably and was in good condition by the time he began working for respondent.

Dr. Dalenberg was cross-examined regarding claimant's preexisting back problems and acknowledged that claimant could have had a DRE Category III 10 percent impairment to the body as a whole for the back symptoms that claimant displayed in 1995. However, when pressed, Dr. Dalenberg acknowledged that his opinion regarding what, if any, preexisting impairment claimant had suffered as a result of those earlier injuries was speculation at best. He was unable to say that his opinion regarding claimant's preexisting impairment was provided within a reasonable degree of medical certainty or probability. It is significant to note Dr. Dalenberg was the only health care professional to testify in this matter.

After claimant was released from treatment, respondent was unable to accommodate his restrictions and claimant began seeking employment elsewhere. As noted above, the parties stipulated claimant failed to put forth a good faith effort to obtain employment after leaving respondent. Claimant submitted only one job application, that being to Goodyear.

Claimant, instead, elected to work in his business called LMP Production (LMP), which he described as a clothing, car stereo, television store. Claimant testified that he was in the process of buying and selling merchandise. This is a business that claimant had owned prior to his employment with respondent and was in the process of purchasing while working for respondent. Claimant's income tax returns, which were placed into evidence, indicated that claimant lost money at this business in 2002 and, as of the time of the regular hearing in July, had made no profits for the year 2003.

Claimant was referred to two vocational experts for an evaluation of his wage and employment history, including what tasks he performed over the 15 years preceding his accident, as well as opinions regarding what, if any, wage-earning ability claimant possessed after leaving respondent. Vocational expert Dan Zumalt was hired on behalf of respondent, with vocational expert Richard Santner hired on behalf of claimant. Both provided analyses after having reviewed the medical reports in evidence and both provided opinions regarding what, if any, wage-earning ability claimant would possess within his restrictions and limitations.

At oral argument to the Board, claimant's attorney argued that Mr. Zumalt, respondent's expert, was in violation of *Roberts*, having utilized the medical opinion of Michael L. Smith, M.D., in determining what, if any, wage-earning ability claimant possessed. The Board acknowledges that Mr. Zumalt, in his report of August 26, 2003,[2]

[2] Zumalt Depo., Zumalt Ex. 2.

does list the report of Dr. Smith and other medical doctors. However, at the time the report was offered, no objection was made by claimant's attorney to the admissibility of the report. The only objection noted in the record was claimant's attorney's generic objection, raising a lack of foundation, when Mr. Zumalt was asked about claimant's ability to earn a comparable wage.

The Board notes that claimant's own expert, Richard Santner, in his report of July 14, 2003,[3] also lists the medical report of Michael L. Smith, M.D., as being information considered by Mr. Santner when reaching an opinion regarding claimant's ability to earn post-injury wages. There was, likewise, no objection to Mr. Santner's report when it was admitted into evidence.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[4] The Board will first consider the question dealing with the admissibility of the opinion of Mr. Zumalt regarding claimant's ability to earn wages. The Board acknowledges that the Kansas Supreme Court, in *Roberts*, limited the ability of a vocational expert pursuant to K.S.A. 44-519 to consider medical opinions not contained in the record. However, as noted in *Roberts*, K.A.R. 51-3-5a restricts the reports from being considered as evidence "unless all parties stipulate to the reports, records, or statements or unless the report, record, or statement is later supported by the testimony of the physician, surgeon, or other person making the report, record, or statement."

As noted above, the reports of both Mr. Santner and Mr. Zumalt contain reference to Dr. Smith's medical reports and both reports were admitted into evidence without objection by either party. Therefore, it would appear that the opinions of both Mr. Santner and Mr. Zumalt, regarding claimant's ability to earn post-injury wages, were stipulated into evidence. As both Mr. Zumalt and Mr. Santner referenced Dr. Smith's reports, it would appear, if claimant's attorney were successful in his bid to exclude Mr. Zumalt's opinion, then it would only be fair that the opinion of Mr. Santner, which also referenced Dr. Smith's report, be excluded as well. Had there been a timely objection, the Board's determination regarding the admissibility of these reports might be different. However, the objections were not made in a timely fashion, and the records and reports were stipulated into evidence. The Board, therefore, denies claimant's request to exclude the report and opinion of Mr. Zumalt.

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[3] Santner Depo., Cl. Ex. 2.

[4] K.S.A. 44-501 and K.S.A. 44-508(g).

The Board will next consider whether claimant suffered a functional impairment which preexisted his February 26, 2001 injury sufficient to allow for a reduction in the award under K.S.A. 44-501(c). K.S.A. 44-501(c) reads:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

Functional impairment has been defined as,

> . . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[5]

The Court of Appeals has held in the past that the Act requires that preexisting functional impairment be established by competent medical evidence and rateable under the appropriate edition of the *Guides* if the condition is addressed therein.[6]

The Act does not require that functional impairment be actually rated before the subsequent work-related injury nor that the worker be given work restrictions for his or her preexisting condition. However, the preexisting condition must have actually constituted a rateable functional impairment.

Additionally, it is the burden of respondent and its insurance carrier to prove the amount of functional impairment that existed before claimant's February 26, 2001 date of accident.[7] In this instance, the only medical opinion discussing claimant's preexisting functional impairment was that of Dr. Dalenberg. While Dr. Dalenberg did elude to a possible 10 percent preexisting impairment under the AMA *Guides* (4th ed.), DRE Category III, he acknowledged on cross-examination that his opinion was speculative. He stated that claimant's preexisting impairment could have been anywhere from a zero to a 10 percent, but it was a guessing game. The Board finds, pursuant to *Hanson*, that respondent has failed to prove what, if any, preexisting functional impairment claimant had

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[5] K.S.A. 44-510e(a).

[6] *Watson v. Spiegel, Inc.*, No. 85,108 (Kansas Court of Appeals unpublished opinion filed June 1, 2001) (copy attached pursuant to Sup. Ct. Rule 7.04); K.S.A. 44-510e.

[7] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, Syl. ¶ 5, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

and, therefore, the 10 percent impairment to the body as a whole awarded by the ALJ pursuant to the opinion of Dr. Dalenberg is affirmed.

K.S.A. 44-510e(a) states:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

This statute, however, must be read in light of both *Foulk*[8] and *Copeland*.[9] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above quoted statute) by refusing to attempt to perform an accommodated job which the employer had offered and which paid a comparable wage. In this instance, it was acknowledged by the parties that respondent was unable to accommodate claimant's restrictions and, therefore, the limitations set forth in *Foulk* do not apply. However, the Kansas Court of Appeals, in *Copeland*, held, for the purposes of the wage-loss prong of K.S.A. 44-510e(a) (Furse 1993), that a worker's post-injury wages should be based upon the ability to earn wages, rather than actual wages being received, when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury. In this instance, the Board is relieved of the responsibility of determining whether claimant made a good faith effort to find post-injury employment as it was stipulated at oral argument that claimant had not put forth a good faith job search. It is acknowledged claimant made only one attempt at obtaining a job, that being his attempt to find employment at Goodyear, before he focused his attention on his business, LMP. The Board is, therefore, handed the task of determining what, if any, wage-earning ability claimant possessed after the injuries of February 26, 2001.

The two wage experts, Mr. Santner and Mr. Zumalt, both provided opinions regarding claimant's ability to earn wages. Mr. Santner determined claimant had the ability

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[8] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[9] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

to earn up to $9 an hour, which, when compared to claimant's average weekly wage of $490.84, would result in a 27 percent wage loss. However, claimant had significant training from his past, of which Mr. Santner was not apprised. Claimant had, over his lifetime, been trained in construction, home cleaning, general plumbing, general electrical, painting, interior finishing, siding and roofing, and masonry and tile work. In fact, LMP, claimant's company, was a general home improvement company as early as 1990. Claimant also worked for a company called Emerson Construction, performing general construction work. Mr. Santner acknowledged after being advised of this additional training and experience, that claimant's income potential could be higher than the $9-an-hour opinion he had expressed.

Mr. Zumalt, in reviewing claimant's past work history, determined that claimant could make anywhere from $8.11 an hour to $21.22 an hour. This averages to $14.67 an hour, which would equate to a wage of $586.60 on a 40-hour week, which would exceed claimant's average weekly wage on the date of the accident. Even averaging the opinions of Mr. Zumalt and Mr. Santner, claimant's ability would be approximately $448.70, which would be 92 percent of claimant's wage on the date of accident. Under K.S.A. 44-510e, this would be equal to 90 percent or more of claimant's gross average weekly wage on the date of injury. Claimant would, therefore, be precluded from a work disability under K.S.A. 44-510e and limited to his 10 percent functional impairment.

The Board determines, based upon the medical opinion of Dr. Dalenberg and the vocational opinions of both Mr. Zumalt and Mr. Santner, that claimant's wage-earning ability exceeds 90 percent of his average weekly wage as it existed on the date of accident. Claimant is, therefore, limited, under K.S.A. 44-510e and *Copeland*, to his functional impairment of 10 percent to the body as a whole. The Board, therefore, affirms the Award of the ALJ.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Brad E. Avery dated March 12, 2004, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of September 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: George H. Pearson, Attorney for Claimant
John David Jurcyk, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director